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No. 80-2016

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

JAMES P. FRACKELTON,

Petitioner,

vs.

GUS SWANSON, VIRGINIA SWANSON,
SHIA SHAPIRO,

Respondents.

On Petition For a Writ of Certiorari to the
Ohio Supreme Court

RESPONDENTS, GUS SWANSON'S AND VIRGINIA SWANSON'S, BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court has jurisdiction, under 28 U.S.C.A. Section 1257(3), to review the dismissal of petitioner's complaint where petitioner did not properly assert in the state courts the unconstitutionality of the ground for dismissal.

II. Whether the requirement under Ohio common law that an individual bringing an action for malicious prosecution must allege as damages the arrest of his person or seizure of his property constitutes denial of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Supreme Court of Ohio are all those parties listed in the caption of the case in this Court.

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CONSTITUTIONAL PROVISION

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This action comes before the Court for a review of the dismissal of a complaint for malicious prosecution and abuse of civil process filed by petitioner, James P. Frackelton, on December 7, 1978 in the Court of Common Pleas of Cuyahoga County, Ohio. The complaint alleges that respondents, Gus Swanson and Virginia Swanson, by and through their attorney, Shia Shapiro, had maliciously and without probable cause brought an action against the petitioner for breach of warranty and negligence.

The litigation of which petitioner complained arose out of a vasectomy performed by petitioner on Gus Swanson. After the vasectomy Virginia Swanson, the wife of Gus Swanson, had become pregnant and had delivered a child on February 28, 1974. On or about May 24, 1974 the Swansons filed a complaint against the petitioner for breach of warranty and negligence in the performance of the vasectomy. At the close of respondents' case, the court directed a verdict for petitioner.

In his complaint in this case, petitioner alleged, inter alia, that the pressure from respondents' lawsuit had mandated his resignation as Chairman of the Department of Family Practice at Fairview General Hospital; that the filing of respondents' lawsuit had caused petitioner a mental trauma requiring hospitalization; and that petitioner had been deprived of property through loss of business and increase malpractice insurance premiums. The complaint did not allege arrest of petitioner's person, seizure of his property, subjection to forcible entry and detainer or the issuance of a temporary restraining order or injunction against him or the improper or wrongful use of process by petitioners. These allegations are essential elements of the actions for malicious prosecution and abuse of civil process in Ohio.

Based on the absence of these allegations, respondents Swanson and respondent Shapiro each filed a Motion to Dismiss Petitioner's Complaint, pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure (A.1), for failure to state a claim upon which relief can be granted. Petitioner filed a Brief in Opposition to the motions. Petitioner advanced as arguments against the Swansons' Motion to Dismiss that the complaint adequately states a cause of action, that the Court should reject what is known as the "strict" or English rule and adopt a more liberal rule of malicious prosecution and that the facts alleged established a cause of action even under the "strict" rule. The petitioner says absolutely nothing about the due process or equal protection provisions of either the State of Ohio Constitution or the Fourteenth Amendment to the United States Constitution. (This Brief has been lodged with the Clerk of the Supreme Court.)

The trial court, without opinion, dismissed with prejudice the petitioner's complaint against respondents Swanson and respondent Shapiro.

Petitioner appealed the dismissal to the Court of Appeals for the Eighth Appellate District. Petitioner presented an argument virtually identical to that raised in the trial court and again made no federal or state due process and equal protection arguments. (This Brief has been lodged with the Clerk of the Supreme Court.) The Court of Appeals affirmed the decision of the trial court.

Petitioner appealed as of right to the Supreme Court of Ohio and moved that court for an order directing the Court of Appeals to certify its record. In his Memorandum in Support of Jurisdiction, petitioner raised for the first time the matters of due process and equal protection. The Ohio Supreme Court overruled the Motion to Certify and dismissed the appeal for lack of a substantial constitutional question.

SUMMARY OF ARGUMENT

This Court does not have jurisdiction, under 28 U.S.C.A. Section 1257(3) to review the dismissal of petitioner's complaint. The petitioner did not properly assert in the Court of Common Pleas and in the Court of Appeals that the dismissal was violative of the principles of due process and equal protection. Thus, these issues were not before the Ohio Supreme Court and that court properly did not consider these arguments. Having failed to present this federal question properly in the state courts, the petitioner has not properly invoked the jurisdiction of this Court and the Petition for Writ of Certiorari must be dismissed.

The action in Ohio for malicious prosecution is a common law cause of action that has evolved over a long period of time. It is improper for the petitioner to request that this Court change the elements of the cause of action for malicious prosecution in Ohio. This petitioner has not been treated unlike all those others in Ohio asserting a claim of malicious prosecution. Thus, he has not been denied equal protection of the laws. Further, there is no deprivation of due process of law in the decisions by the various courts that the petitioner must satisfy all of the requirements for a cause of action for malicious prosecution.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION UNDER 28 U.S.C.A. SECTION 1257(3) TO REVIEW THE DISMISSAL OF PETITIONER'S COMPLAINT FOR THE PETITIONER DID NOT PROPERLY ASSERT IN THE STATE COURTS THE FEDERAL QUESTIONS HE NOW SEEKS TO RAISE.

Petitioner may not invoke the jurisdiction of this Court unless he complies with the requirements of 28 U.S.C.A. Section 1257(3) which states:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The petitioner must necessarily raise the Federal question of the state court in order to invoke this Court's jurisdiction pursuant to 28 U.S.C.A. 1257(3). This Court considers only such questions as were raised in the lower court. Fachnacht v. Frank, 90 U.S. (23 Wall.) 416 (1874); Hill v. California, 401 U.S. 797 (1971). This long-standing principle was stated in Powell v. Brunswick County, 150 U.S. 433, 439 (1893), as follows:

> "As many times reiterated, it is essential to the maintenance of jurisdiction upon the ground of erroneous decision as to the validity of a state statute or a right under the Constitution of the United States, that it should appear from the record that the validity of such statute was drawn in question as repugnant to the Constitution and that the decision sustained its validity, or that the right was specifically set up or claimed and denied. ...A definite issue as to the validity of the statute or the procession of the right must be distinctly deducible from the record before the state court can be held to have disposed of such a Federal question by its decision."

See also Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972).

Further, it has been determined that where a state court has not decided the Federal question there is an assumption that the omission was due to lack of proper presentation in the state court. Sidney Street v. State of New York, 394 U.S. 576 (1969); Chicago, Indianapolis and Louisville Railway Co v. McGuire, 196 U.S. 128 (1905).

Not only were the Federal questions not properly presented to the Ohio Supreme Court but the petitioner has failed to demonstrate that the Ohio Supreme Court properly considered and ruled upon the Federal questions. Review of the petitioner's brief in both the trial court and the Court of Appeals demonstrates that there was no discussion whatsoever of due process and equal protection principles and that these issues were initially raised in the Ohio Supreme Court as one of a half dozen "propositions of law" before the Ohio Supreme Court.

The Ohio Supreme Court sets forth the law established in a given case in the syllabus of its opinion. Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952). Paragraph 3 of the syllabus in state, ex rel. Babcock v. Perkins, 165 Ohio St. 185 (1956) states:

> "3. Where an appeal on questions of law is taken to the Supreme Court from the Court of Appeals, which latter court had jurisdiction of the subject matter and the parties to the action, the Supreme Court will not consider or determine claimed errors which were not raised and preserved in the Court of Appeals."

Thus, failing to raise the Federal questions in the trial court or in the intermediate appellate court is a fatal error and the Federal questions thus were not before the Ohio Supreme Court. Consequently, the Petition for a Writ of Certiorari must be dismissed.

II. A NECESSARY ELEMENT OF AN ACTION FOR MALICIOUS PROSECUTION IS ARREST OF THE PERSON OR SEIZURE OF PROPERTY AS A RESULT OF JUDICIAL PROCESS SUCH A REQUIREMENT DOES NOT CONSTITUTE A DENIAL OF DUE PROCESS OR EQUAL PROTECTION.

In Ohio, to establish a claim for malicious prosecution, the plaintiff must allege arrest of his person or seizure of his property. The Ohio Supreme Court long ago announced this requirement:

> "As a general rule no suit will lie for the malicious prosecution of a civil action where there has been no arrest of a person or a seizure of property." Cincinnati Daily Tribune Co. v. Bruck, 61 Ohio St. 489, (1900)

Accord, Skarbinski v. Henry H. Krause, Co., 378 F. 2d 656, 14 Ohio Misc. 54 (6th Cir., 1967); Dakters v. Shane, 64 Ohio App. 2d 196 (Lorain Cty., 1978), m.c.o. (September 7, 1978); W.D.G., Inc. v. Mutual Manufacturing & Supply Co., 5 Ohio Ops. 3rd 397 (Ohio Apps., Franklin Cty., 1976); Avco Delta Corp. v. Walker, 22 Ohio Apps. 2d 61 (Franklin Cty., 1969); Delk v. Colonial Finance Co., 118 Ohio Apps. 451 (Hamilton Cty., 1963); Perry v. Arsham, 101 Ohio Apps. 285 (Cuyahoga Cty., 1956); Board of Education v. Harting, 7 Ohio Misc. 64 (C.P., Madison Cty., 1966).

The necessity for this element of the malicious prosecution action has been recently reviewed and confirmed by an Ohio Court of Appeals in a case brought by a doctor who was victorious in an original action brought against him by his patient. The doctor sued his former patient and her attorney for having filed an action against him for negligence in a surgical procedure. It was later established that he had nothing to do with the surgery and he was dismissed from the suit. The Court of Appeals state that even if the original action had been maliciously instituted there was a fatal deficiency in the doctor's claim because there was no seizure of property: "Here there was neither an arrest of Dakters nor a seizure of his property." Further, the court noted that the law of Ohio, be it strict or harsh, is still that to have a legitimate claim for malicious prosecution the plaintiff must have been arrested or had his property seized:

> "We recognized that the rule is not the majority rule, (See 52 Am. Jur. 2d, Malicious Prosecution §10) and it has been severly criticized. (See, Prosser, Torts 4th Ed. §120).
>
> Yet it is still the law of Ohio until such time as the Supreme Court overrules it. Thus, we follow it and affirm the judgment." Dakters v. Shane, 64 Ohio App. 2d 196, 412 N.E. 2d 399, 401 (Lorain Cty., 1978), m.c.o. (September 7, 1978).

The Court of Appeals held that the requirements for a malicious prosecution action were not satisfied and the summary judgment granted by the trial court was affirmed.

In the instant case the Court of Appeals enunciated the reasons for the arrest or seizure of property requirement:

> "While the Ohio rule represents a minority view, important policy considerations support its continued application. First, litigants should have ready access to courts without risking liability for unsuccessful suits. Second, were suits for malicious prosecution more easily used, disputes

> in litigation would tend to be perpetuated rather than be concluded. While other elements must be proved in an action for malicious prosecution, the availability of a remedy for purported malicious prosecution without the arrest of a person or seizure of his property would loom as an uncertain threat against plaintiffs, discouraging their pursuit of bona fide claims."

Petitioner argues that a denial of equal protection arises because of the differences in the elements essential to a malicious prosecution action in Ohio and in other states. But, there is no claim that the petitioner has been treated in a fashion different from other plaintiffs in Ohio who advance a malicious prosecution claim. Because the petitioner is not placed in a "suspect class" and has been treated as have all other malicious prosecution plaintiffs in Ohio he has not been denied equal protection.

As for the denial of due process, which the petitioner alleges arises from lack of access to the state courts, this argument cannot stand. The petitioner had access to the court but did not have a cause of action. It is not a denial of due process for our Ohio courts to dismiss a cause of action because of the absence of an essential element. The trial court and appellate courts applied Ohio law, adopted in 1900 in the form of the "strict" arrest or seizure of property rule. In short, petitioner has no property interest of which he has been deprived. Nothing has been taken from him. Simply put, the events he complains of do not give rise to a cause of action for malicious prosecution in Ohio. And, it is submitted, it is not for this Court to creat a new form of action for malicious prosecution in Ohio. Ohio courts and the Ohio legislature are the appropriate forums for review. The Supreme Court of Ohio had an opportunity to review existing Ohio law and on February 26, 1981 it chose not to do so and dismissed the petitioner's appeal.

This Court should not accept this case after the Supreme Court of Ohio chose not to undertake a review of the elements required for the cause of action alleged and should dismiss the Petition for a Writ of Certiorari.

CONCLUSION

The petitioner did not properly assert in the Court of Common Pleas and in the Court of Appeals that the dismissal of his complaint was violative of the principles of due process and equal protection. These issues were first raised before the Supreme Court of Ohio and that court properly did not consider these arguments. For this reason this Court does not have jurisdiction and the Petition for a Writ of Certiorari must be dismissed.

The petitioner cannot call upon this Court to change the elements of the cause of action for malicious prosecution in Ohio. To require that this petitioner be able to assert the elements essential for his claimed cause of action neither denies him equal protection of the laws nor deprives him of due process of law. This petitioner has been deprived of no constitutional rights and, having failed to properly invoke the jurisdiction of this Court, the Petition for a Writ of Certiorari should be dismissed.

Respectfully submitted,

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APPENDIX

OHIO RULES OF CIVIL PROCEDURE

Rule 12(B)

(B) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided, however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.